

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

State of North Dakota; Industrial Commission of)
North Dakota; Lignite Energy Council; Basin)
Electric Power Cooperative; The North)
American Coal Corporation; Great Northern)
Properties Limited Partnership; Missouri Basin)
Municipal Power Agency, doing business as)
Missouri River Energy Services; Minnkota)
Power Cooperative, Inc.)

Plaintiffs - Appellees)

v.)

Beverly Heydinger, Commissioner and Chair,)
Minnesota Public Utilities Commission; David)
C. Boyd, Commissioner, Minnesota Public)
Utilities Commission; Nancy Lange,)
Commissioner and Vice Chair, Minnesota)
Public Utilities Commission; Dan M. Lipschultz,)
Commissioner, Minnesota Public Utilities)
Commission; Betsy Wergin, Commissioner,)
Minnesota Public Utilities Commission; Mike)
Rothman, Commissioner, Minnesota)
Department of Commerce, each in his or her)
official capacity)

Defendants - Appellants)

-----)
State of North Dakota; Industrial Commission of)
North Dakota; Lignite Energy Council; Basin)
Electric Power Cooperative; The North)
American Coal Corporation; Great Northern)
Properties Limited Partnership; Missouri Basin)
Municipal Power Agency, doing business as)
Missouri River Energy Services; Minnkota)
Power Cooperative, Inc.)

Plaintiffs – Appellants)

Case No. 14-2156

**APPELLANTS' MOTION
TO DISMISS
APPELLEES'
CROSS-APPEAL**

Case No. 14-2251

v.)
)
 Beverly Heydinger, Commissioner and Chair,)
 Minnesota Public Utilities Commission; David)
 C. Boyd, Commissioner, Minnesota Public)
 Utilities Commission; Nancy Lange,)
 Commissioner and Vice Chair, Minnesota)
 Public Utilities Commission; Dan M. Lipschultz,)
 Commissioner, Minnesota Public Utilities)
 Commission; Betsy Wergin, Commissioner,)
 Minnesota Public Utilities Commission; Mike)
 Rothman, Commissioner, Minnesota)
 Department of Commerce, each in his or her)
 official capacity)
)
 Defendants - Appellees)

BACKGROUND

The district court granted summary judgment to Appellees, reasoning that the statute in question violated the dormant commerce clause. (Apr. 18, 2014 Mem. Op. and Order (Doc. No. 210).) Appellants appealed the district court decision. (Notice of Appeal (Doc. No. 219).) Appellees then cross-appealed, claiming that the district court decision should, in the alternative, be affirmed on the other grounds that Appellees advanced in the district court. (Notice of Cross Appeal (Doc. No. 224).) The cross-appeal also asserts that the district court erred in denying attorneys' fees and non-taxable costs to Appellees, an issue that the district court is presently revisiting at Appellees' request. (*Id.*; Motion for Attorney Fees (Doc. No. 212); Minute Entry for Proceeding on Motion for Attorney Fees (Doc. No 237) (taking motion for attorney fees under advisement on July 9, 2014).)

ARGUMENT

Appellees' cross-appeal is improper and should be dismissed. The alternative grounds asserted for affirming the district court's decision are not an appropriate basis for a cross-appeal. *See, e.g., Ashanti v. City of Golden Valley*, 666 F.3d 1148, 1151 (8th Cir. 2012) ("We may affirm a judgment on any ground raised in the district court, and the party that prevailed in the district court need not file a cross-appeal to raise alternative grounds for affirmance." (quoting *Transcontinental Ins. Co. v. W.G. Samuels Co.*, 370 F.3d 755, 758 (8th Cir. 2004))).

As stated by the Court in *Lloyd v. Hardin County, Iowa*, 207 F.3d 1980 n. 2 (8th Cir. 2000):

Because [Appellee] merely asserts in its cross-appeal additional grounds upon which the district court's order could be affirmed, those arguments are responsive to [Appellant's] appeal and should not have been styled as a separate cross-appeal.

See also, e.g., Smith v. Johnson and Johnson, 593 F.3d 280 n. 2 (3rd Cir. 2010) (stating [Appellee's] cross-appeal is superfluous and we will dismiss it.") Such an improper cross-appeal would also generate unnecessary briefing and allow Appellees to "enjoy the benefit of having an opportunity for extra briefing due to its own procedural error." *Id.*

As for the attorney fees and costs issue, Appellees filed with the district court a motion for their attorney fees and costs. (Motion for Attorney Fees (Doc. No. 212); May 5, 2014 Order Setting a Briefing Schedule for Plfs' Motion

for Attorneys' Fees (Doc. No. 216).) The motion has now been briefed by the parties and heard by the court. (*See, e.g.*, Minute Entry for Proceeding on Motion for Attorney Fees (Doc. No 237).) The court has the motion under consideration and a new order will be forthcoming, (*id.*), from which Appellees can appeal if they are aggrieved by the decision.

CONCLUSION

Based upon the foregoing, Appellees' cross-appeal should be dismissed and the briefing schedule be modified accordingly.

Dated: July 11, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 11, 2014, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Alethea M. Huyser

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